

[*Kester v. Carolina Power & Light Co.*](#), ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003)

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210



ARB CASE NO. 02-007
ALJ CASE NO. 00-ERA-31
DATE: September 30, 2003

In the Matter of:

RICHARD M. KESTER,
COMPLAINANT,

v.

CAROLINA POWER AND LIGHT COMPANY,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Stewart W. Fisher, Esq., *Glenn, Mills & Fisher, Durham, North Carolina*

For the Respondent:

Douglas E. Levanway, Esq., Brenda Currie, Esq., *Wise, Carter, Child and Caraway, PA, Jackson, Mississippi*

FINAL DECISION AND ORDER OF REMAND

Richard M. Kester filed a complaint against Carolina Power and Light Company (CP&L) under the employee protection provisions of the Energy Reorganization Act (ERA or Act), 42 U.S.C.A. § 5851 (West 1995)¹ alleging that CP&L terminated his employment due to his protected activity involving a security breach at CP&L's nuclear facilities. The Administrative Law Judge (ALJ) concluded that he had failed to establish that CP&L retaliated by discharging him. Therefore, the ALJ dismissed the complaint. Kester appealed. We find that Kester engaged in protected activity, that the protected activity was a contributing factor in his termination, and that CP&L failed to show that it would have discharged him absent this protected activity. Therefore, we reverse the

ALJ's Recommended Decision and Order² dismissing Kester's complaint and remand this case to the ALJ to award appropriate relief.

BACKGROUND

We have carefully reviewed the record and find that it generally supports the ALJ's lengthy recitation of the facts. R. D. & O. at 2-38. Therefore, we will summarize.

Kester began work for CP&L in August 1996 as a security support analyst in corporate access authorization (CAA). Robert Gill, the CAA director, supervised him. The CAA group conducted background investigations and approved clearances for employees and contractors needing access to Brunswick, Robinson, and Shearon Harris, CP&L's nuclear power plants.

Kester's performance for 1997 was rated as "exceeds expectations," and he was promoted to acting superintendent of the CAA group. On April 26, 1998, he became the superintendent and received a ten percent salary increase. He continued to report directly to Gill. Later that year, following a highly successful outage³ at the Harris plant, Kester earned a \$1,000 performance award. His 1998 performance appraisal, which Gill signed on February 4, 1999, reflected his superior management skills, and he received a four percent pay raise.⁴

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Starting on Friday, January 29, 1999, a series of events involving the falsified clearances of three contract employees eventually led to one employee's termination and a Nuclear Regulatory Commission (NRC) security investigation.⁵ Over the weekend of February 6-7, 1999, Gill began to worry that he might be fired, especially because a 1997 NRC security investigation revealed his involvement in regulatory violations resulting in CP&L being fined \$55,000.

During February, Gill began secretly interviewing employees who reported to Kester, supposedly because of an anonymous complaint about Kester's CAA group.⁶ On March 5, 1999, Gill confronted Kester with a "laundry list" of negative comments the CAA employees had made about Kester's management style. According to Kester, Gill then suggested that if Kester told the NRC investigator that he, Kester, would take full responsibility for the falsified clearances, the "problem" with his employees could be worked out just between them.⁷ Kester was "dumbfounded" that Gill had been interviewing his employees and that he wanted him to take the blame for the February falsification events, especially since Gill had taken over the investigation of those events while Kester was on leave.⁸

On March 8, 1999, Kester met with Terry Morton and John Caves⁹ and discussed his concern that Gill wanted him to lie to the NRC investigator about the falsified clearances. R. D. & O. at 41. Gill found out about this meeting and told Shawn Nix, a human

resources representative, and William Johnson, CP&L's Vice-President of corporate security, that Kester was insubordinate because he had refused to produce a plan to improve his management style. This was not true.

Meanwhile, Kester met with the NRC investigator and explained how he had dealt with the falsified clearances. He did not tell him about Gill's "blackmail" attempt. On March 24, 1999, Kester began his medical leave for colon surgery.

While he was gone, Gill continued to discuss Kester's "performance problems" with Nix and Johnson. CX 145. Nix recommended to Johnson that Kester be terminated because of his refusal to provide a performance improvement plan, as Gill had falsely represented. Johnson agreed with her strong recommendation, stating that Kester's refusal to improve his performance constituted "inappropriate borderline insubordination." TR at 812.

On April 26, 1999, the day he returned to work from medical leave, Gill told Kester he was fired. Kester filed a pro se complaint with DOL's Occupational Safety and Health Administration (OSHA), alleging that he was fired because he made an internal complaint implicating nuclear safety. OSHA notified Kester on July 19, 2000, that his allegations were not substantiated. Kester requested a formal hearing, which was held on January 23-25, 2001. In his October 18, 2001 Recommended Decision and Order, the ALJ dismissed Kester's complaint.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to review an ALJ's recommended decision in cases arising under the environmental whistleblower statutes. *See* 29 C.F.R. § 24.8 (2002). *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the ALJ's recommended decision. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-2, 97 CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

The Board is not bound by an ALJ's findings of fact and conclusions of law because the recommended decision is advisory in nature. *See* Att'y Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) ("the agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself"). *See generally Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986) (under principles of administrative

law, agency or board may adopt or reject ALJ's findings and conclusions); *Mattes v. United States Dep't of Agriculture*, 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (relying on *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) in rejecting argument that higher level administrative official was bound by ALJ's decision). An ALJ's findings constitute a part of the record, however, and as such are subject to review and receipt of appropriate weight. *Universal Camera Corp. v. NLRB*, 340 U.S. at 492-497; *Pogue v. United States Dep't of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991); *NLRB v. Stor-Rite Metal Products, Inc.*, 856 F.2d 957, 964 (7th Cir. 1988); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1076-1080 (9th Cir. 1977).

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In weighing the testimony of witnesses, the fact-finder considers the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Jenkins v. United States Envtl. Pro. Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 10 (ARB Feb. 28, 2003) (citations omitted). The ALJ, unlike the ARB, observes witness demeanor in the course of the hearing, and the ARB defers to an ALJ's credibility determinations that are based on such observation. *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, ALJ No. 93-ERA-6, slip op. at 6 (ARB July 14, 2000).

ISSUE

Whether Kester demonstrated that CP&L discriminated against him, and if he did, whether CP&L proved it would have fired Kester even absent his protected activity.

DISCUSSION

The Legal Standard

Despite disagreeing with the ALJ's conclusion that CP&L did not violate the Act, we note his thorough recitation of the underlying facts and his thoughtful analysis. Nevertheless, he does not explicitly state Kester's burden of proof. Furthermore, his discussion of dual motive analysis is flawed. For these reasons, therefore, and because some confusion continues to exist concerning the ERA's overall evidentiary framework, we will clarify.

Prior to the 1992 amendments, the Act itself did not provide guidance as to the parties' burdens of proof. An ERA complainant, to prevail, was required to prove by a preponderance of the evidence that his protected activity was a "motivating factor" in the employer's unfavorable personnel decision. If the complainant proved his case, the employer could avoid liability if it could show, also by a preponderance of the evidence, that it would have reached the same decision even absent the protected conduct.^{[10](#)}

In 1992 Congress amended section 5851 of the Act.¹¹ Now, unless an ERA complainant, before the hearing, makes a "prima facie showing" that his protected activity was a "contributing factor in the unfavorable personnel action alleged in the complaint," the Secretary of Labor will not investigate and must dismiss his complaint.¹² Should the complainant make this initial "prima facie showing," the Secretary investigates the claim unless the employer "demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior."¹³ When the complainant reaches the hearing stage of the ERA litigation process, however, he must "demonstrate," that is, prove by a preponderance of the evidence,¹⁴ that his protected activity was a "contributing factor" in the employer's decision.¹⁵ Even then, the Secretary may not grant relief if the employer demonstrates "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence" of protected activity.¹⁶

Therefore, since this case has been tried on the merits, the relevant inquiry before us is whether Kester has successfully met his burden of proof that CP&L discriminated.¹⁷ That burden is to prove by a preponderance of evidence that he engaged in protected activity under the ERA, that CP&L knew about this activity and took adverse action against him, and that his protected activity was a contributing factor in the adverse action CP&L took.¹⁸ Then, if Kester meets this burden, we will proceed to determine whether CP&L has demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. CP&L's burden of proof is in the nature of an affirmative defense and arises only if Kester has proven that CP&L fired him in part because of his protected activity. Examining whether CP&L meets this burden of proof is typically referred to as "dual motive" analysis. If Kester does not prove that CP&L fired him in part because of his protected activity, neither the ALJ nor we have reason to engage in dual motive analysis.¹⁹

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Protected Activity

The ALJ credited Kester's testimony over that of Gill, Caves, and Morton in finding that Kester's telling Morton and Caves that Gill wanted him to lie to a NRC investigator was protected activity. R. D. & O. at 40-41. We defer to the ALJ's credibility determinations. We find that the record fully supports the fact that Kester met with Morton and Caves and told them about Gill's blackmail attempt. Furthermore, we agree with the ALJ's conclusion that Kester, by articulating his concern about Gill's blackmail attempt to Morton and Caves, tried to guarantee that he could speak truthfully to the NRC investigator about the falsification events without fear of reprisal from Gill. R. D. & O. at 42.

To constitute protected activity under the ERA, an employee's acts must implicate safety definitively and specifically. *American Nuclear Res., Inc. v. United States Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998). Kester's CAA department was the first line

of defense in protecting CP&L's nuclear plants from persons lacking authorized access. By reporting Gill's blackmail attempt, Kester acted to ensure that he could tell the NRC investigator the complete truth: what happened, why, and who was involved in the falsification events. Only then could the NRC take appropriate corrective action to prevent future clearance problems. Thus, we find that Kester's report to Morton and Caves implicated safety and therefore is protected activity.

Adverse Action and CP&L's Knowledge of Protected Activity

Johnson, on Nix's recommendation, made the decision to fire Kester. TR at 767-69, 817-18. Terminating Kester's employment constitutes adverse action. Also, the ALJ found that while Johnson and Nix were not actually aware of Kester's protected activity when he talked to Morton and Caves, such knowledge could be imputed to them. R. D. & O. at 42-44. We agree.

Knowledge of protected activity may be shown by circumstantial evidence. A whistleblower must show that an employee with authority to take the adverse action, or an employee "with substantial input" in that decision, knew of the protected activity. *See Mosley v. Carolina Power & Light Co.*, 94-ERA-23, slip op. at n.5 (ARB Aug. 23, 1996). Gill admitted that he knew Kester had talked with Caves on March 8, 1999, about the conversation he and Kester had on March 5 regarding what might be said to the NRC investigator. TR at 518-20. Thus, Gill was well aware of Kester's protected activity.

Though Johnson was not aware of what Kester had told Morton and Caves when he decided to fire him, Gill was aware, and his misleading reports about Kester's alleged insubordination were part of the basis for Johnson's decision. Therefore, because Gill had knowledge of the protected activity and substantial input in the decision to fire Kester, Johnson is deemed to have been aware of the protected activity. *See Thompson v. Tennessee Valley Auth.*, 89-ERA-14, slip op. at 5 (Sec'y July 19, 1993).

Causation

Less than two months elapsed between Kester's March 8 meeting with Caves and Morton and his termination on April 26. Under these facts, the ALJ inferred causation. R. D. & O. at 44. We agree that retaliatory motive may be inferred when adverse action closely follows protected activity. *See Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *Keys v. Lutheran Family and Children's Services of Mo.*, 668 F.2d 356, 358 (8th Cir. 1981) (less than two months). Moreover, the record contains additional persuasive evidence that Kester was fired because of protected activity. We revisit the background leading to Kester's termination in more detail.

Kester was an exemplary employee with a solid background and sound experience in security work and managerial supervision. He was Gill's protégé, promoted to superintendent to "put some discipline into the department," and highly praised for his work throughout 1998. TR at 437. What is more, Gill admitted that he "bought into"

Kester's initial actions in dealing with the falsification events that began on January 29, and felt that "it was handled the way it needed to be handled at the time." TR at 372-73.

After dealing with the falsification events during the week, Kester had Friday, February 5 off for medical testing. TR at 469-70. On that day, the third falsified background investigation, which actually resulted in an access badge being issued, was discovered. TR 157-58. Gill began to worry over the weekend of February 6-7 when he realized the NRC implications of the third contract employee being issued a badge based on a falsified background investigation.²⁰

Gill had good reasons to be concerned. He had been in charge of access authorization in 1997 when the NRC fined the company \$55,000.00 for security breaches.²¹ He was not affected, but one employee was fired and another demoted. CX 34; TR at 50, 433. Thus, Gill was motivated to attempt to escape blame for the recent falsification events. In fact, Kester testified that Gill told him that he feared he would be fired for the falsification events because it was his "second time." TR at 175. Therefore, to protect himself, Gill decided to use the anonymous employee complaint as a reason to interview Kester's subordinates. Gill knew they were not particularly happy with Kester's efforts to "put some discipline into the [CAA] department." He also knew some of them had received less-than-stellar performance appraisals. TR at 203-08, 463-66.

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Gill conducted thirteen interviews during February but said nothing about this to Kester until March 5 when he confronted Kester with the negative employee feedback. TR at 178-82, 371-72. Kester testified that Gill told him that they could "fix this working together." TR at 181. According to Kester, Gill stated, "You can change your attitude by telling the NRC that you are the only management responsible [for] the decisions made as a result of the falsification incident, and no other management was involved." TR at 180-81.

Gill denied saying this. Rather, he testified that he told Kester to give him a written plan to address his "performance issues" by Monday, March 8. TR at 392-96. Kester testified that Gill never set a deadline for submitting a plan. TR 188-89. Like the ALJ, we believe Kester. *See* R. D. & O. at 21 n.22, 43-44. We find that Gill was trying to pressure Kester into taking the blame for the falsification events by threatening to use the negative results of the employee interviews against him. Kester rightfully described Gill's overture as "blackmail." TR at 182; R. D. & O. at 23, 40.

That afternoon Kester called Alan Britton, the Brunswick plant's security superintendent, to discuss what to do. Britton testified that they discussed Kester's meeting with Gill. He told Kester he should report his conversation to the employee concerns department. On Monday, March 8, 1999, Britton called Kester and told him to contact Morton, who managed the employee concerns division. TR at 183-84, 564, 601, 871-74.

When Gill found out about Kester's March 8 meeting with Morton and Caves, he decided to use the negative employee feedback against Kester. TR 192-94; RX 6. He told Nix and Johnson that Kester was refusing to draft a performance improvement plan. TR at 483-84, 763-67. Yet when Kester left on medical leave on March 24, Gill told him they would work on an improvement plan when he returned. TR at 198-201. But at the same time he was telling both Nix and Johnson that Kester was insubordinate because he was refusing to meet Gill's deadline for the performance improvement plan. TR at 767, 811-12.²² Before Kester returned from his medical leave, Johnson decided to fire him, based largely on Kester's alleged "lack of interest in improving performance after the [falsification] event, despite given several chances to do so."²³ TR at 817.

The scenario just described compels us to find that Gill, fearful of losing his job because of the impending NRC investigation, determined to make Kester the scapegoat. He gathered some unfavorable comments about Kester's management ability and told Kester that these "issues" could be resolved if Kester would lie to the NRC about who was at fault for the security breaches. Shortly thereafter, when Gill learned that Kester had reported the blackmail attempt to Morton and Caves, he became more fearful and retaliated by misleading Nix and Johnson into believing that Kester was insubordinately refusing to take steps to improve his performance.

We find that Johnson decided to fire Kester, at least in part, because Gill told him Kester was insubordinate. Furthermore, since Gill told Johnson this lie because of Kester's protected activity in telling Morton and Caves about the blackmail attempt, Kester's protected activity was therefore a contributing factor in Johnson's decision to fire him. In Johnson's own words, Kester's "refusal to improve performance was a *key part* of [his] decision to terminate." TR 856 (emphasis added).

Thus, combining the inference that CP&L discriminated (less than two months separated Kester's protected act and the decision to fire him) and his proof that Gill's illegitimate input contributed to Johnson's decision to fire him, Kester proved by a preponderance of evidence that CP&L discriminated. Therefore, we conclude that CP&L violated the Act.

Dual Motive

Since Kester has proven a violation, CP&L may avoid liability by demonstrating with clear and convincing evidence that it would have fired Kester even absent his protected activity. CP&L cannot meet this burden.

In addition to Kester's alleged insubordination, Johnson decided to fire him for two other reasons: the results of a 1998 survey indicating that CAA employees were

concerned about Kester's management ability, and Kester's performance during the falsification events in 1999. CX 52, 148; TR at 817, 823. CP&L has not demonstrated that Johnson would have decided to terminate Kester for these other reasons. CP&L cannot overcome Johnson's testimony:

Q: And without his refusal to improve, his alleged refusal to improve, you wouldn't necessarily have discharged him. Right?

A: I might not have discharged him then, that's correct. I may have discharged him later based on what the NRC found and other things.²⁴

TR at 856.

We find that this testimony unequivocally establishes that in April 1999, Johnson decided to fire Kester only because of the supposed insubordinate refusal to improve. As Kester correctly argues, CP&L's burden is to demonstrate by clear and convincing evidence that it "would have," not "might have," fired Kester for other reasons. Complainant's Brief at 29.

CONCLUSION

Kester has proven by a preponderance of the evidence that his protected activity contributed to the decision to terminate his employment. CP&L has not shown it would have terminated Kester's employment in the absence of his protected activity. As a result, Kester is entitled to relief according to 42 U.S.C.A. § 5851(b)(2)(B). We therefore **ORDER** that this matter be **REMANDED** to the ALJ for further proceedings consistent with this decision.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

[ENDNOTES]

¹ The statute provides, in pertinent part, that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . [notifies a covered employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C. § 2011 *et seq.* (2000)), refuses to engage in a practice made unlawful by the ERA or AEA, testifies regarding provisions or proposed provisions of the ERA or AEA, or commences, causes to be commenced or testifies, assists or participates in a proceeding under the ERA or AEA]."

² The following abbreviations shall be used: Claimant's Exhibit, CX; Respondent's Exhibit, RX; Hearing Transcript, TR; Recommended Decision and Order, R. D. & O.

³ The term outage describes the shutdown of a nuclear facility for maintenance work that cannot be done when the plant is operational. The shutdown procedure places a heavy burden on the CAA group because of the large number of contract employees who must be investigated in a tight time frame. TR 41-43.

⁴ Of the seven categories in the appraisal, Kester earned the highest rating—"strength area"—in five. Under the more detailed factors reflecting feedback from his peers and team members, he did not receive a single "improvement opportunity" for such items as Teamwork, Communication, Leadership, and Human Resources Management. CX 70.

⁵ On January 29, Kester directed a staff person to begin an investigation which soon revealed that Rebecca Johnson, a new employee recently promoted, had not verified prior employment information while conducting background checks for security clearances. Johnson's employment was terminated for falsifying the clearances. Later that week Kester also contacted access authorization personnel at the Robinson and Harris plants and took other action to ensure that access authorization badges were not issued to the persons Johnson had certified. R. D. & O. at 7-14.

⁶ The complaint stated that over the past year five new analysts had been hired in the CAA group, but that one was leaving and three others were looking for jobs elsewhere. The complaint added, "There is something wrong with this picture," and were it not for "our professionalism," team spirit and morale would be at "an all-time low." The complaint asked for "outside intervention." RX 1, CX 68.

⁷ At the hearing, Gill denied that this exchange had occurred. TR at 506.

⁸ On February 5, 1999, Kester took a previously scheduled flex day off and underwent a physical examination which revealed a large colon tumor. That day, Gill found out that Rebecca Johnson had falsely certified a third individual for access to the Robinson plant.

⁹ Terry Morton was the manager for the performance evaluation regulatory affairs group at CP&L. He supervised John Caves who was in charge of NRC regulatory affairs. TR at 183, 564.

¹⁰ See *Mackowiak v. University Nuclear Systems, Inc.*, 735 F. 2d 1159 (9th Cir. 1984); *Consolidated Edison Co. of New York v. Donovan*, 673 F. 2d 61 (2nd Cir. 1982); *Dartey v. Zack Company of Chicago*, 82-ERA-2 (Sec'y April 25, 1983).

¹¹ Pub. L. No. 102-486, 106 Stat. 2776, 3023-24 (1992).

¹² 42 U.S.C.A. § 5851(b)(3)(A). Although the investigation ceases and the Assistant Secretary for Occupational Health and Safety dismisses the complaint, the complainant may nevertheless proceed since 29 C.F.R. § 24.5(d) allows either party to file a request

for an ALJ hearing and thus further adjudicate the complaint. The Eleventh Circuit described this investigative phase of ERA litigation as a "gatekeeper test." *See Stone & Webster Eng. Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997). Likewise, in *Trimmer v. United States Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999), the court noted that the new administrative gatekeeping function in the amended ERA created a framework "distinct" from Title VII, where the plaintiff has no comparable obligation. *See* 42 U.S.C.A. § 2000e, *et seq.* (West 1999). We note that a recent ALJ opinion interprets *Trimmer* as indicating "the ERA amendments *replace* the Title VII framework." (Emphasis added). This interpretation misstates *Trimmer* and may create confusion. *See Fritts v. Indiana Michigan Power Co.*, 2001-ERA-33, slip op. at n.10 (ALJ March 7, 2003) (Appeal pending, ARB No. 03-073).

The Title VII evidentiary "framework," whereby the plaintiff establishes a prima facie case, the defendant rebuts it, and the plaintiff then attempts to prove pretext, is a method, or formula, or structure for evaluating proof of intentional discrimination. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See also* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich. L. Rev. 2229, n.3 (1995). Recently, the Ninth Circuit described the *McDonnell Douglas/Burdine* structure as a "tool" by which plaintiffs might survive summary judgment and reach trial. *See Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 (9th Cir. 2002). The Title VII formula "serves to bring the litigants and the court expeditiously and fairly" to the ultimate question of whether the plaintiff has persuaded the trier of fact that discrimination occurred. *Burdine*, 450 U.S. at 253. "The method suggested in *McDonnell Douglas* for pursuing this inquiry ... is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

The amended ERA certainly does not preclude a complainant from presenting a circumstantial case of retaliation at a hearing before a Department of Labor ALJ. Nor do the 1992 amendments dictate or suggest that an ALJ, or this Board, not rely, when appropriate, upon the established and familiar Title VII methodology for analyzing and discussing evidentiary burdens of proof. Indeed, when the Board recently applied the Title VII pretext framework in an ERA case brought under the amended Act, we explained that because most ERA complaints are grounded on circumstantial evidence of retaliatory intent, "this Board and reviewing courts routinely apply the framework of burdens developed for pretext analysis under Title VII." *See Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128, ALJ No. 97-ERA-53, slip op. at 14 (ARB April 30, 2001) (citing two pre-1992 amendment ERA cases). However, we continue to discourage the unnecessary discussion of whether or not a whistleblower has established a prima facie case when a case has been fully tried. *See Williams v. Baltimore City Pub. Schools Sys.*, ARB No. 01-021, ALJ No. 00-CAA-15, slip op. at n.7 (ARB May 30, 2003).

¹³ 42 U.S.C.A. § 5851 (b)(3)(C).

¹⁴ See 42 U.S.C.A. § 5851(b)(3)(C). See also *Dysert v. Secretary of Labor*, 105 F. 3d 607, 609-10 (11th Cir. 1997).

¹⁵ As noted earlier, prior to the 1992 amendments, the ERA complainant was required to prove that protected activity was a "motivating factor" in the employer's decision. Congress adopted the less onerous "contributing factor" standard "in order to facilitate relief for employees who have been retaliated against for exercising their [whistleblower rights]." 138 Cong. Rec. No. 142 (Oct. 5, 1992). Congress may have been recalling that in 1989 it enacted the Whistleblower Protection Act, Pub. L. 101-12, § 3(a)(13), 103 Stat. 29. The WPA requires a complainant to prove that a protected disclosure was a "contributing factor in the personnel action" 5 U.S.C.A. § 1221 (e)(1) (West 1996).

¹⁶ 42 U.S.C.A. § 5851 (b)(3)(D).

¹⁷ An ALJ recently indicated that the Board had "not been consistent" in applying the ERA's *burdens of proof*. He maintains that in *Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 1997-ERA-38 (ARB July 31, 2002), "the Board applied a *Title VII burden-shifting framework*" but in *Gutierrez v. Regents of the Univ. of Cal.*, ARB No 99-116, ALJ No. 1998-ERA-19 (ARB Nov. 13, 2002), "the *Title VII framework* is not mentioned." See *Fritts*, slip op. at n.10 (emphasis added).

The ALJ appears to be confusing a litigant's "burden of proof" with the "evidentiary framework" employed to evaluate proof of discrimination. See the discussion at note 12. To be sure, the phrase "burden of proof" is ambiguous because it has been used indiscriminately. Courts have used the phrase to mean a litigant's obligation, at a particular time during a trial, to either create a prima facie case or meet one created against them. However, correctly used, the term means the necessity of *finally* establishing the existence of a fact or set of facts by evidence which meets a particular "standard of proof," e.g., preponderance, clear and convincing, beyond a reasonable doubt. See Volume 31A C.J.S. at 251-52.

The Board applied the same, and the correct, ERA "burdens of proof" in *Gale* and *Gutierrez*. See *Gale*, slip op. at 7-8; *Gutierrez*, slip op. at 6. However, in order to determine whether the parties met their burdens, we did employ different "analytical frameworks" because the nature of the evidence in those cases differed. Katherine Gale presented circumstantial evidence of discrimination to the ALJ who then examined Ocean Imaging's reasons for firing her. He found them to be pretextual and ruled for Gale. We examined the employer's reasons, found them to be legitimate, and concluded that Gale had not proved by a preponderance of the evidence that her protected activities contributed to her dismissal. In short, both the ALJ and the Board utilized the Title VII burden shifting pretext framework because it was warranted in this typical whistleblower case where the complainant initially makes an inferential case of discrimination by means of circumstantial evidence.

Joe Gutierrez, on the other hand, did not rely upon circumstantial evidence of discrimination. Unlike the *Gale* analysis, neither the ALJ nor the Board had to infer a

causal nexus between protected activity and adverse action. Rather, at his hearing Gutierrez introduced a performance evaluation assessment. This document clearly established that his employer retaliated because of protected activity. This performance evaluation not only contained an unfavorable comment about his protected activities, itself an adverse action, but also ultimately resulted in Gutierrez suffering a diminished salary. Therefore, the ALJ and the Board did not apply the Title VII pretext framework because it was not necessary in evaluating whether or not Gutierrez had met his ERA burden of proof.

¹⁸ *Paynes v. Gulf States Utilities*, ARB No. 98-045, ALJ No. 93-ERA-47, slip op. at 4-5 (ARB Aug. 31, 1999).

¹⁹ *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ No. 1996-ERA-34, slip op. at 6 (ARB March 30, 2001). The ALJ's interpretation of dual motive analysis at R. D. & O. 49-50 is incorrect. Relying on *Talbert v. Washington Pub. Power Supply Sys.*, ARB No. 96-023, ALJ No. 1993-ERA-35, slip op. at 4 (ARB Sept. 27, 1996), he writes that an ERA complainant *must* produce "direct" evidence in order to trigger the dual motive analysis. This reflects a misreading of *Talbert*. There, because the complainant "produced evidence that directly reflects the use of an illegitimate criterion in the challenged decision," the Board concluded that Talbert had proven discrimination by a preponderance of the evidence. *Id.* at 9. The Board, therefore, went on to examine whether the employer proved by clear and convincing evidence that it would have made the same decision. *Talbert*, like *Gutierrez*, discussed at n. 17, was one of the rare cases in which the complainant did not have to rely upon circumstantial evidence to prove his case. But *Talbert* did not hold that a complainant *must* produce "direct" evidence before the ALJ (or ARB) examines whether the employer proved by clear and convincing evidence that it would have made the same decision. Nor does the ERA require "direct" evidence. The Act requires only that the complainant prove by a preponderance of sufficient evidence, direct or circumstantial, that the protected activity contributed to the employer's decision. *Cf. Desert Palace, Inc. v. Costa*, __U.S.__, No. 02-679, slip op. at 11 (June 9, 2003) (A Title VII plaintiff is not required to present direct evidence of discrimination in order to obtain a mixed-motive jury instruction.).

²⁰ On Sunday, February 7, Gill sent a series of e-mails to Kester, directing him to brief Gill by noon on Monday, the 8th regarding the issues and scope of the falsification events. CX 69. He began interviewing Kester's subordinates shortly thereafter. RX 4. Furthermore, at the hearing he admitted that he had failed to take certain actions he should have. TR at 408, 470-72, 481-82.

²¹ One worker with a criminal record and three others with psychological problems had access to the Harris plant for more than a month. Other workers who were not properly cleared also had unrestricted access. TR at 46-48, 428-30.

²² Nix strongly recommended to Johnson that Kester be fired because of his insubordinate refusal to submit a performance improvement plan. She based this solely on Gill's statements to her. TR at 768, 783-88. Johnson testified that it appeared that Kester's

reaction to Gill's concerns was to "ignore" his performance problems. "He [Kester] refused to take any actions to correct his performance. He came close to termination based on this conduct alone." CX 148; TR at 850-59.

²³ Gill never told Kester that Johnson and Nix were "very concerned" that Kester had not produced a performance improvement plan. TR at 402, 522-23. Gill admitted that he told Kester he could work on this plan after his recovery from surgery, but never informed Johnson that he had given Kester more time to produce the plan. TR at 525-26.

²⁴ The results of the NRC investigation were released on May 6, 1999. CX 110, 111.